UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ROBENSON JEAN-PIERRE AND JEAN METELUS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,	)	Civil Action No. 18-11499-MLW
Plaintiffs,	)	
vs.	)	
J&L CABLE TV SERVICES, INC.,	)	
Defendant.	)	

BEFORE THE HONORABLE MARK L. WOLF
UNITED STATES DISTRICT JUDGE

VIDEOCONFERENCE

August 31, 2021

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P R O C E E D I N G S

THE COURT: Good afternoon. Would the clerk please call the case.

COURTROOM CLERK: This is Civil Action Number 18-11499, *Robenson Jean-Pierre, et al. v. J&L Cable TX Services*.

THE COURT: Good afternoon. Would counsel please identify themselves for the Court and for the court reporter.

MR. EDELSTEIN: Good afternoon, Your Honor. Ori Edelstein from Schneider Wallace for the plaintiffs.

MS. SAVETT: Good afternoon, Your Honor. Stacy Savett from Berger Montague for the plaintiffs.

THE COURT: Stop, stop, stop. Excuse me. Stop. Ms. Savett, I couldn't hear you clearly, and the stenographer may not have heard you either. Would you say your name again, and we'll check your connection.

MS. SAVETT: Yes, Your Honor. Stacy Savett from Berger Montague for plaintiffs' counsel.

THE COURT: Okay. Now, Ms. Schalman.

MS. PIAZZA: Good afternoon. This is Alexandra Piazza from Berger Montague.

MS. SCHALMAN-BERGEN: Good afternoon, Your Honor. Sarah Schalman-Bergen from Lichten and Liss-Riordan.

MS. LIM: Good afternoon, Your Honor. Michelle Lim from Schneider Wallace.

THE COURT: And for the defendant?

MR. FINBERG: Good afternoon, Your Honor. This is Rick Finberg for defendant.

THE COURT: All right.

MR. BENNETT: Your Honor, Peter Bennett for the defendant. Good afternoon.

THE COURT: All right. I'm sorry, who was that? Mr. Bennett, okay. Thank you.

As you know, but I will say for the record, this is a class action alleging violations of the Fair Labor Standards Act or FLSA and related Massachusetts, Maine and New Hampshire as well as Pennsylvania wage and hour laws brought by several subclasses in an FLSA collective of field technicians against their employer, former employer, defendant J&L Cable TV Services. Robenson Jean-Pierre, John Metelus, Bill McKee and Michael Gary Fauntleroy are the named plaintiffs.

The class, as we've just heard, is represented by Schneider, Wallace, Cottrell, Konecky, LLP, or SWCK, Berger Montague, sometimes referred to as BM, and Lichten & Liss-Riordan PC.

The parties reached a proposed settlement agreement under which J&L would pay a gross settlement amount of $1,850,000 to the class to resolve their wage and hour claims. Following a February 3, 2021 preliminary approval hearing and after considering supplemental briefing by class counsel, the

Court preliminarily approved the settlement on May 10, 2021. I also approved a form of notice to the class, which I understand is implemented.

So today's hearing is to address whether the settlement should be finally approved, the class counsel's motions for attorneys' fees and expenses and the request for service awards to each of the four named plaintiffs.

To my knowledge, no objections or requests for exclusions from the settlement have been received. Is that correct, to counsel's understanding as well?

MR. EDELSTEIN: Yes, Your Honor, that's correct. There have been no requests for exclusions and no objections.

THE COURT: You'll have to identify yourself for the record when you're speaking, Mr. Edelstein.

MR. EDELSTEIN: My apologies. Ori Edelstein for the plaintiffs.

THE COURT: This is a hearing being conducted by videoconference, but it's open to the public. Is there anybody on the videoconference who wishes to object to the settlement? No.

So in my May 10, 2021 memorandum and order, docket 77, for reasons described at pages 3 to 5, I've found that this Court has jurisdiction over the state law claims. I did that analysis on the assumption there would be 475 state law class members and 218 FLSA collective opt-in members. How many state

class members are there now?

MR. EDELSTEIN: Your Honor, I think it's 545 state class members and 75 opt-ins. Sorry, sorry. Ori Edelstein for the plaintiffs, so you have it for the record. It is 545 state class members with 75 opt-ins who are not participants in one of the state classes. It is 218 total opt-ins, but most of those are also participants in one of the classes.

THE COURT: Okay. I thought it was 632. But it's 618?

MR. EDELSTEIN: 632 is the correct number. If my math didn't add up, then I apologize.

THE COURT: I don't think it did. 545 and 75, I think that's going to be 610. Anyway. Well, go ahead.

MR. EDELSTEIN: It is 75 opt-ins were not class members, and it's 632 total collective and class members, so whatever the math is, that gets us 557 class members, Your Honor.

THE COURT: Okay. There are a total of 632.

MR. EDELSTEIN: Correct.

THE COURT: All right. Well, I've considered numbers of approximately that dimension. And unless somebody wants to add something, I find that those numbers don't alter the analysis that I did on May 10 or in the May 10, 2021 memorandum and order, so I continue to find that there's jurisdiction.

Does anybody want to be heard on that?

MR. EDELSTEIN: Ori Edelstein for the plaintiffs, Your Honor. No objection to that.

THE COURT: All right. And am I correct that the notice required by the Class Action Fairness Act, 28 United States Code, Section 1715(d) was given to the relevant State Attorneys General and U.S. Attorneys in October 2020 and no objections from them have been received?

MR. EDELSTEIN: Correct, Your Honor.

THE COURT: And was the notice distributed to the class in the manner that I ordered previously?

MR. EDELSTEIN: It was, Your Honor.

THE COURT: All right. So I believe the matters on the agenda are the following. First I have to decide whether to finally certify the state law classes that I preliminarily approved. As I understand it, I finally approved the FLSA collective. I finally certified the FLSA collective on May 10. Is that right?

MR. EDELSTEIN: Correct, Your Honor.

THE COURT: Then we'll move from class certification to argument concerning whether the proposed settlement should be finally approved. I have a couple of questions about the allocation plan. Then we'll move to the motion for attorneys' fees and then to the motion for service awards and I think to approve Greater Boston Legal Services as the cy pres recipient.

Are there other matters that should be on the agenda?

MR. EDELSTEIN: Not for plaintiffs, Your Honor.

MR. FINBERG: Nor for defendants, Your Honor.

THE COURT: In the May 10, 2010 order with regard to preliminary approval, I wrote that for the purposes of preliminary approval, the plaintiffs have satisfied the requirements of numerosity, commonality and typicality, and that the action may properly be maintained under Rule 23(b)(3) of the Federal Rules of Civil Procedure.

After considering plaintiffs' supplemental memorandum and supporting documents, the Court also concludes that the named plaintiffs are adequate class representatives for the purpose of preliminary approval of the settlement.

I'm not aware of any developments that call into question whether those should be my final conclusions with regard to Rule 23(b)(3), but would counsel like to address that, class certification?

MR. EDELSTEIN: Thank you, Your Honor. Ori Edelstein for the plaintiffs. We would agree with Your Honor's assessment. There have been no changes in that analysis that would cause the Court to alter its preliminary approval, and we would ask the Court to finally approve the class. We're happy to address any of the issues individually, but I don't believe that's necessary.

THE COURT: This will come up in connection with the service awards. The adequacy of the class representatives, the

class action paradigm, although this isn't a public PLSRA case, it's not a securities case, but I think the paradigm generally, as I wrote in *Arkansas Teacher*, is that the clients pick the lawyers. The clients supervise the lawyers, including with regard to settlement, and scrutinize any requests for attorneys' fees.

I questioned the named representatives thoroughly last February, and I made the preliminary findings that I made. But in this case, and perhaps if not probably in most cases like this, it looks like the lawyers found the class representatives. I think all of them -- I re-read this yesterday. I think all of them testified that they didn't know about the terms of the settlement until they had been agreed to by the lawyers.

So why should I find the class representatives adequate? And if any of the principles that I stated you think are not applicable here, don't be timid about telling me.

MR. EDELSTEIN: Thank you, Your Honor. Ori Edelstein for the plaintiffs. Adequacy looks at the claims of the representatives and whether or not they are going to represent the interests of the class, and they've done that here. And they spent considerable time actively involved in litigation from the get-go, as Your Honor heard from them directly and in the supplemental briefing and declarations that you received from the named plaintiffs. Each of them was involved and

actively involved from the get-go, assisted in the drafting of the complaint --

THE COURT: They assisted -- hold on just a second. Just one second. All right. Why don't you go ahead and try to be specific because I don't think they all did the same thing.

MR. EDELSTEIN: True, Your Honor, but they were all actively involved from the get-go. You know, our first two named plaintiffs were involved in drafting the initial complaint. They scrutinized those documents to ensure that the allegations in those were accurate. There were multiple calls and interviews with each of them to ensure that what was being alleged was accurate, the claims captured all the violations that were potentially at issue, and that was all in the interest of the class.

After filing the complaint, they were involved in drafting their declarations in support of conditional certification. They were discussing and consulted in discussions on settlement ADR.

THE COURT: I don't think so. I think the testimony I heard in February told me that only Mr. McKee and Mr. Fauntleroy spoke to you about mediation and settlement before the mediation.

MR. EDELSTEIN: That was the testimony, Your Honor. I think in the supplemental declarations you can see that we did have calls, counsel did have calls with each of the named

plaintiffs before the mediation to discuss potential early resolution. I think that maybe at the time of the testimony that wasn't -- they didn't recall that, but they did supplement that in their declarations.

THE COURT: Are those calls reflected in the law firm's records?

MR. EDELSTEIN: Yes, Your Honor.

THE COURT: Okay.

MR. EDELSTEIN: They all -- I believe they all may have only been the first two named plaintiffs that were involved in discovery as well, though I believe the other two were involved -- let me correct that. Sorry.

All four of the named plaintiffs were involved in discovery as well. Two of them did serve responses, and the other two were part of the opt-ins who were subject to discovery just prior to reaching a resolution of the case. And throughout that time while they were doing that, they had the class interests at heart, and that's reflected I think, as Your Honor noted, there have been no objections and no requests for exclusions.

What they have done here is they have obtained a really excellent result for the class and collective, and they did that by keeping the class and collective interests at heart the entire time. They weren't in this for their own personal benefit. They weren't seeking only to recover the money for

themselves. They at all times were doing this for the class's benefit. And because of their efforts, they obtained the result that is going to benefit many people, 632 of them.

And I would note, Your Honor, they are attending the hearing. They didn't make an appearance officially, but they are all here attending the hearing to make sure this gets completed and approved.

THE COURT: I see Mr. Fauntleroy. I see Mr. McKee. I see Mr. Metelus, and I see Mr. Jean-Pierre.

Okay. Well, I'm satisfied that the requirements of Rule 23(a) and (b)(3) are met, so I'm certifying, I'm now certifying for settlement purposes the state law settlement class as described on page 3 of the proposed order the plaintiffs gave me, docket number 143-4, more specifically a Massachusetts state law class comprised of all individuals who worked for J&L Cable TV Services as a technician in Massachusetts between July 18, 2015 and August 28, 2020, a New Hampshire state law class comprised of all individuals who worked for J&L Cable TV Services, Inc. as a technician in New Hampshire between July 18, 2015 and August 28, 2015. I'm certifying a Maine state law class comprised of all individuals who worked for J&L Cable TV Services as a technician in Maine between July 18, 2012 and August 28, 2020. I'm certifying a Pennsylvania state law class comprised of all individuals who worked for J&L Cable TV Services, Inc. as a technician in

Pennsylvania between July 18, 2015 and August 28, 2020.

I note that I previously finally certified the federal FLSA settlement collective as being comprised of all current and former technicians who were employed by J&L Cable TV Services between July 18, 2015 and August 28, 2020 who have opted in to this case.

Is there anything further with regard to class certification?

MR. EDELSTEIN: Not from plaintiffs, Your Honor.

THE COURT: All right. Let's move to the motion to approve the settlement pursuant to Rule 23(e). To approve the settlement I have to make the finding -- well, I have to find after hearing that it is fair, reasonable and adequate, and I must consider whether the class representatives and the class counsel have adequately represented the class, whether the proposal was negotiated at arm's length, whether the relief provided for the class is adequate, taking into account certain specified factors, and whether the proposal treats class members equitably relative to each other.

The plaintiffs have addressed this in their memorandum, but would you like to speak to it, Mr. Edelstein?

MR. EDELSTEIN: Sure, yes, Your Honor. Was that just generally or was there something in particular you wanted --

THE COURT: Why should the settlement be approved?

MR. EDELSTEIN: Thank you, Your Honor. As Your Honor

noted, the question is whether it's a fair, reasonable and adequate settlement. I think the class and collective members have all spoken by their decision not to opt -- to exclude themselves or to object to the settlement. 632 people received the notice approved by the Court, and none of them had any issues with the settlement.

I would note that the notice provided to them indicated exactly -- well, not exactly -- gave them an approximate amount as to their recovery. It outlined the fees, the amounts that were to be paid to the attorneys, the service awards, the administration costs and a summary of what they would expect to receive. And with all that information provided, none of them felt the need to object or request exclusion, and I think that's because this is an excellent settlement for all of those 632 individuals.

The average recovery is almost $1800 per person. The max recovery is over $12,000 with 318 individuals receiving more than a thousand dollars and 185 receiving more than $200,000. These amounts are significant for these employees. It reflects the time and effort that they should have been paid, and they saw that information and determined on their own that this was a fair, reasonable and adequate settlement, including the fee request, the service awards and the admission costs.

THE COURT: Well, I do find class counsel are

experienced and vigorous and adequate, to use a term of art. As I said before, I think the class representatives didn't direct the attorneys or advise as much as would be ideal, but I think that reflects somewhat the nature of the class, that people are technicians, two of them not born in the United States as I recall.

Am I right that the settlement was negotiated at arm's length after mediation and not immediately after mediation?

MR. EDELSTEIN: Correct, Your Honor. The settlement was negotiated through the mediator, Mark Irvings. We had a session I believe in May, beginning of May, and the settlement wasn't reached until three and a half months later in late August. And in that time we continued to negotiate the terms but we also re-initiated litigation.

At that point was when the opt-ins were subject to discovery. We were working on preparing responses for 52 opt-ins. We were working on scheduling a significant number of depositions. So the case did not sit still at that point. All parties believed that a settlement was not at that time in the works, even though we continued to negotiate, and that was reached only through arm's length negotiations.

THE COURT: And what formal and informal discovery did you have from the defendants before agreeing to settlement?

MR. EDELSTEIN: Before we had formal discovery responses, I think they produced, prior to mediation,

approximately 12,000 pages of documents. We had pay and time records for portions of the class and collective. We had personnel files for our clients with policies and handbooks that were applicable. I believe we had some GPS records showing the time and locations of the trucks that the technicians were driving. I believe following the first day of the mediation additional documents were produced, a total of I believe over 21,000 documents were received and reviewed prior to the settlement being agreed to.

THE COURT: Okay. And what were the costs and risk of litigation, a trial and appeal?

MR. EDELSTEIN: Thank you, Your Honor. As with any wage and hour class action, there's always risks for the collective that it would be de-certified for the classes, that they would not be certified, and that's something that plaintiffs' counsel deal with on all these wage and hour claims at the outset.

I would note as well that following mediation there was a motion to amend defendants' answer to assert an affirmative defense that would have barred all the overtime claims altogether. The magistrate judge rejected --

THE COURT: What affirmative defense was that?

MR. EDELSTEIN: I think it was for sales associate, I believe. I can't recall off the top of my head. The magistrate judge denied that motion, but it was on a request

for reconsideration and would have potentially undermined all of the claims or all the overtime claims altogether if the defendants could prove that affirmative defense.

And then beyond just certification issues, there's always liability issues, whether or not we can -- there was obviously a dispute. Defendants denied that the technicians were working off the clock. Whether or not we could prove that at trial, and of course, even if we could, as Your Honor noted, there would be appeals most likely as a result if we were to continue to litigate.

THE COURT: And we, I believe, discussed this before, but the actual settlement by your calculation provides what percentage of potential damages if you were to prevail?

MR. EDELSTEIN: Yes, Your Honor. And we updated those numbers for you in our final approval papers accounting for the additional class members. The total, including liquidated damages, the total exposure was 5.33 million that we calculated. So our settlement is 35 percent of that, which is a robust portion of the actual total exposure.

When you look just at the substantive damages, excluding the liquidated damages, the settlement is 85 percent of the exposure, which is an even more obviously robust and an excellent outcome in this situation.

THE COURT: If you calculated the damages correctly, which you may have, are multiple damages available under all of

the laws or just some of the state laws?

MR. EDELSTEIN: Multiple. I'm not sure I --

THE COURT: The liquidated damages, treble damages.

MR. EDELSTEIN: Well, liquidated damages, yes, it's available under the FLSA, and then it is available, I believe single, double liquidated damages is available under -- I'm going to mix these up, Pennsylvania and -- no -- Massachusetts and Maine I believe have treble damages, and Maine and New Hampshire have double damages.

THE COURT: All right. Thank you. Are the class members treated equitably compared to each other?

MR. EDELSTEIN: Yes. So to account for that, we used work weeks, and we allocated two work weeks for the Pennsylvania and New Hampshire classes and three -- sorry -- two shares per work week for Pennsylvania and New Hampshire and three shares for Massachusetts and Maine.

THE COURT: And was there some concern that if this litigation went on and the plaintiff prevailed, the defendant would not have a financial means to pay a judgment?

MR. EDELSTEIN: That is always a risk, Your Honor, and it's highlighted by the quarantine and the COVID-19, I think that was a very legitimate concern and risk that was involved here. We had many cases where that has become an issue. That was raised as a part of the settlement. It's one of the reasons why we had a payment plan where defendants are paying

into the QSF over time. They've already paid a significant amount of that, and I don't see -- we haven't heard any concerns that they wouldn't be able to, but there's always --

THE COURT: Here. Let me try to unpack this a little bit. So was it your concern that during the COVID-19 pandemic, which hasn't disappeared by any means, people would have fewer service technicians in their homes, that J&L's business might fail, or their ability -- they could become bankrupt or their ability to pay a substantial judgment in the future would be injured. Is that part of your concern?

MR. EDELSTEIN: I mean, that's a concern, yes, for all of our pieces. It wasn't particular to this case. Our more immediate concern was trying to get money for our clients and for the class and collective, recognizing, you know, that this quarantine and COVID-19 is impacting everybody significantly, and we wanted to try to get them the money that was owed to them or as much of it as we could soon as possible.

THE COURT: When you said "as soon as possible," the settlement agreement provides for 11 payments, the first one I think at the preliminary approval in May and ten other equal monthly installments. Why is that? And why was it reasonable?

MR. EDELSTEIN: Correct, Your Honor. What I was just indicating was that was part of the issue I think surrounding the quarantine and COVID-19 and defendant's financial health. That was part of our discussions with them. And one of the

reasons we did that was their inability to pay all the money up front or the risk of doing so, and we tried to accommodate that by having it paid over time.

THE COURT: And have the payments, monthly payments been made?

MR. EDELSTEIN: They have, Your Honor, yes. And defendants do have the option of paying all of the money at any point. So if they are on more secure financial footing, they hopefully will do that so we can get the money out to the class as soon as possible.

THE COURT: All right. You say "as soon as possible." It has to be essentially 11 months after May of 2021, right?

MR. EDELSTEIN: I believe the last payment is in March of 2022 following that schedule. However, what I was noting was that they have the option of paying more if they are able to. So my hope was that if they were able to that they would do that and therefore would be able to get the money --

THE COURT: This will come up later. When do the attorneys get any award of attorneys' fees I may make, at the same time as the distribution to the class?

MR. EDELSTEIN: Correct, Your Honor.

THE COURT: All right. Mr. Finberg, do you want to be heard on the reasonableness of the settlement?

MR. FINBERG: Briefly, Your Honor. We can certainly confirm that the negotiations were at arm's length and extended

over a number of months and likely only succeeded due to the continuing involvement of the mediator, Mr. Irvings. Certainly this matter is hotly contested in terms of liability as well as whether a collective action and Rule 23 certification would have been appropriate absent the resolution.

So we fully expected, had this not settled, that we would have had months, if not years, of additional litigation, including motion work, motion for de-certification, opposition to motion for certification. And I would suspect with this type of case that one or both parties may have ended up on appeal for some issue or other, Your Honor.

So in terms of the liability, we certainly continue to reject the claim that there's any liability, and so we actually think this is quite fair for the plaintiffs. Both the named plaintiffs and their attorneys from our perspective made lemonade out of lemons.

THE COURT: All right. Well, having examined this and considered the arguments at this hearing, I find that the proposed settlement is fair and reasonable and adequate. I find that class counsel have energetically and effectively brought their vast experience to representing the class, that the class representatives have been adequate, the proposed settlement was negotiated at arm's length.

Actually, there was a question I need to ask you that I asked last time but I'd like to confirm. Did the defendant

discuss the attorneys' fees that plaintiffs' counsel would seek or receive before the total amount of the settlement was agreed upon?

MR. FINBERG: No. My recollection is that the settlement amount came first, and as part of that, certainly the settlement agreement contains the proposed amount for the attorneys' fees.

THE COURT: Is that right, Mr. Orstein -- Mr. Edelstein?

MR. EDELSTEIN: That's okay. That's correct. The settlement agreement does indicate that defendants won't object to the amount up to a third, and it was not discussed beforehand.

THE COURT: Okay. It was not discussed before the 1,800,000 was agreed to; is that right?

MR. EDELSTEIN: Correct, Your Honor.

THE COURT: So I'm satisfied that this was negotiated at arm's length after mediation and after continued efforts by the mediator. The settlement was reached after significant informal discovery from the defendant. In those circumstances the settlement is presumptively reasonable, and the other relevant factors confirm the reasonableness of the settlement.

The litigation, had it continued, would have been risky from the plaintiffs' perspective and, in any event, would have been lengthy, and it's possible that the defendant might

not have been able to pay a claim years from now if there was a substantial judgment. The amount of the settlement, it's represented to me, is about 35 percent of potential damages if the plaintiffs prevailed and received double or treble damages. When permitted, it's, I'm told, 85 percent of actual damages. Even if the percentages are not quite that high, they are a significant percentage of the potential recovery, which has to be discounted by the risk of litigation and for the immediate value of the class members getting money soon rather than possibly in the far future.

The class members are treated equitably with regard to, relative to each other. Under the settlement agreement, each will receive a pro rata share of the gross settlement fund based on the number of work weeks that each class member worked for J&L during the relevant time period, adjusting to account for differences in the value of substantive law and penalty claim of Massachusetts and Maine members by awarding those classes additional settlement shares for each week worked. This I find is an equitable allocation.

The attorneys' fees will be awarded within a reasonable range. There have been no objections or opt-outs, and I find the method of distribution is reasonable, even though the plaintiffs have to wait until 2022 to receive their payments. But I do find the settlement is reasonable.

So we'll move to the question of an award of

attorneys' fees. As I understand it, the defendants are requesting 33 percent of the common fund, $616,667 plus expenses in the amount of $44,191.25; is that right?

MR. EDELSTEIN: That's correct, Your Honor.

THE COURT: All right. As I pointed out to you, I wrote about award of attorneys' fees extensively in *Arkansas Teacher v. State Street*, 512 F. Supp. 3d 196, 220-21. I do intend to use the common fund basis for awarding fees. As I wrote in *Arkansas Teacher*, it's my understanding that it's most appropriate to presume an award in the 20 to 30 percent range. It's reasonable to start at 25 percent and to decide whether an upward or downward adjustment is most appropriate.

At this time point the Court is a fiduciary for the class. This isn't an adversary process. I'll note that I didn't bring this to your attention earlier, but I'll mention it because I've read it, the pertinent part of it. The most recent study of fees and class recoveries in Federal Court to my knowledge is in Attorneys' Fees in Class Actions: 2009 - 2013, that's by Eisenberg, Miller and Germano, published at 92 NYU Law Review 937, 952 in 2017. There the Court found that the mean fee in FLSA cases from 2009 to 2013 was 30 percent and the median award was 33 percent.

I've done some calculations. If I were to award 25 percent, that would be $462,500. If I were to award 28 percent, that would be $518,000. If I awarded 30 percent, that

would be $555,000, and the 33.33 percent would be $616,667. So an award of 30 percent, for example, would be $61,667 less than the requested 33 percent award.

And as I said at the preliminary approval hearing, I have some concern that the way the requests are made, if I award 33 percent of the fee, of the common fund as attorneys' fees and make $40,000 of service awards and pay the, I think, $30,000 for administration expenses, that's 40 percent of the total fund, sort of off the top, it's not available. If I awarded 30 percent -- and I know not every class member would get the same, but I think it would average another $100 for each class member as compared to 33 percent.

Anyway, those are things I've been thinking about. Do you want to address the requests for attorneys' fees?

MR. EDELSTEIN: Yes, Your Honor. Thank you. I think as Your Honor noted, this case has been litigated energetically by both sides but particularly by plaintiffs' counsel. We have spent thousands of hours prosecuting this case over the course of three years, and we did that to the significant benefit of hundreds of workers.

These workers, 632 workers who potentially wouldn't have received any money are now receiving on average $1800 each as a result of our work and the work of our named plaintiffs. Notably, as I indicated earlier, the amount of the attorneys' fees requested was in the notice that was distributed to the

class and collective members, and, again, nobody objected and nobody requested an exclusion.

THE COURT: How often do you get an objection in these cases? You do them all the time.

MR. EDELSTEIN: We do. We do get objections at times, not that frequently, but they do exist, they do happen. And that is sometimes a grounds for objecting where the fee requested is exorbitant, but here it's not. The amount of time and effort warrants -- and ultimately the result that was obtained warrants an upward adjustment of the fee request that there be 33 percent that we indicate here. The case is complex. It was litigated heavily. We spent a lot of time on the case.

THE COURT: I know you offered me the detailed records, and I didn't take anybody up on that offer. But when we talk about the lodestar check, I'm going to tell you it's useless in this case. You didn't -- you did tell me, and of course you would have been foolish not to tell me, that you don't have clients who regularly pay the rates ascribed to them. But I still don't know where those rates came from or why they're the customary rates in this community in Boston. But we'll get to that in a minute.

But it's just hard for me to tell what all those hours were spent on. And I say that in part because whatever I award, maybe I'll have the good fortune to see you all again,

and you'll know even better what I'm expecting. But go ahead, keep going.

MR. EDELSTEIN: Thank you, Your Honor. And I would note, I think as Your Honor did earlier, that in wage and hour cases and in particular FLSA cases, the 33 percent is the customary amount. And there is significant risk in these cases that we could have recovered nothing, and that happens at times, and it's one of the risks we face as class counsel on the plaintiffs' side, that we may recover nothing, and in those cases --

THE COURT: Well, what I said was that one Eisenberg study showed that the median was 33 percent. If I understand it correctly, it means that half the awards are higher and half of them are lower and the mean --

MR. EDELSTEIN: Correct.

THE COURT: -- the average was 30 percent.

MR. EDELSTEIN: According to that study, correct. And we did cite you several cases in our motion from the circuit and from the district and from outside, both of those, that show that the 33 percent is regularly awarded in wage and hour class actions.

THE COURT: As I said to you at the preliminary hearing, and I know I'm supposed to consider the amounts customarily given in other cases, but I know these things usually go very fast. Nobody objects. You asked for a third.

The easiest thing for the judge to do is to sign off on it, and then that becomes the customary rate. But, you know, having written in perhaps excruciating detail about how the presumptive range is 20 to 30 percent, start at 25 percent and decide whether to go up or down, I don't know why there would be sort of a general exception for FLSA cases where the customary rate is 33 percent.

MR. EDELSTEIN: And that's understandable, Your Honor. I think there's a couple of issues at play. I think one, as I was just discussing, there's significant risks in these wage and hour class actions and FLSA actions that there will be no recovery at all. I think there's also a public policy question as to encourage. You know, the FLSA is designed to benefit workers who aren't getting paid the amounts they should under the law as well as the wage and hour state law claims. And to encourage these types of actions and make sure that they're being brought and litigated thoroughly and that those workers are getting amounts that are owed to them, you know, there's a public policy argument to make sure that counsel who are adequately able to bring those types of claims are doing so and getting compensated accordingly.

THE COURT: But your colleagues and you are in firms that specialize in these cases, you tell me. Should I be worried that you're not going to take these cases anymore if you start getting only 30 percent instead of 33 percent or 28

percent?

MR. EDELSTEIN: I don't think -- I think the argument spills the other way. It's to encourage as opposed to discourage. I don't think -- no, we probably wouldn't change our practice, but I think because we've taken on those risks of receiving nothing and because we're pursuing very well established public policy interest in pursuing these claims that we should be awarded for that risk.

THE COURT: And so how long have you been doing these kinds of cases, this kind of case?

MR. EDELSTEIN: These class actions in particular, about five years.

THE COURT: And some of your colleagues have had even more experience.

MR. EDELSTEIN: Correct.

THE COURT: I'm trying to get educated. In how many of those cases do you recover nothing?

MR. EDELSTEIN: That's a significant number, significant number actually, Your Honor. You know, we try to minimize those. We try to pick the right cases, but it does happen. Cases get to arbitration early on or they get litigated and don't get certified. We have a similar case that was also cable technicians in California that these two firms were handling where the class was not certified and so we had to pursue claims individually. And yeah, we were unable to

settle that case or reach resolution.

THE COURT: And so did you try the case?

MR. EDELSTEIN: No. We settled it on an individual basis.

THE COURT: And you settled it for one person or small number of people?

MR. EDELSTEIN: Yes, a group of employees, correct.

THE COURT: And about what percentage would you and your colleagues -- they can speak up -- find that you brought the case, you invested time and energy in it and the class and the law firm recovered nothing?

MR. EDELSTEIN: I haven't done a study of all the cases we handled, but I would say probably 10 to 15 percent of cases, and maybe my colleagues may have numbers they can speak to. But for us, it's an estimate for sure. I haven't done that analysis. But there are a significant number of cases where we don't recover anything.

THE COURT: And how do your colleagues respond to that question? You've got two other law firms.

MS. PIAZZA: I mean, I agree it's a small percentage of cases before we recover nothing, but it's not a zero number.

THE COURT: Okay.

MS. SCHALMAN-BERGEN: Your Honor, I did litigate and negotiate the settlement in this case. I switched firms and have a different firm, so I'm local counsel in this matter.

But what I'll say is that in these cases oftentimes we are challenging large labor practices that the company feels very confident in these classification cases. And here in this case the defendants felt very confident that their exemption defense would apply. And so we do -- I don't have a percentage for you, but what I will say is that we lose cases, lose cases on summary judgment, and part of the reason that the FLSA provides for these things is because, as Mr. Edelstein rightly pointed out -- remedial statute, and low-wage workers don't have the resources to go up against these large companies. So allowing contingent fees in the amount of one-third, which, as Your Honor correctly pointed out is the median, the common amount awarded is consistent with the expectations of the client. And it also compensates us for the work that we do.

One of the other things that's I think important to consider in a contingent practice is that we're advancing tens, sometimes hundreds of thousands of dollars. That comes out of the law firm's pockets in a that way it doesn't on the defense side, right. The defendant pays for that. And so the firm is not bearing that cost.

But bearing that cost for a number of large cases is a very risky proposition, and it requires a substantial outlet. And we do it because we believe in the work. We believe and care about the work, and we want to represent the clients, but it does not come without substantial risk. This is a very

risky practice to be in. And you're right that we're very successful, so I don't want to undermine that point.

THE COURT: I saw that Ms. Liss-Riordan gave a million dollars or more than a million dollars to her aborted senatorial campaigns.

MS. SCHALMAN-BERGEN: Ms. Liss-Riordan challenged substantial practices in the economy in which we lost. We had a case as Your Honor is aware --

THE COURT: Don't assume I'm aware.

MS. SCHALMAN-BERGEN: Okay.

THE COURT: Keep going.

MS. SCHALMAN-BERGEN: It's cutting edge litigation.

THE COURT: Which case?

MS. SCHALMAN-BERGEN: In the GrubHub case. So the GrubHub case went to trial, Your Honor.

THE COURT: GrubHub?

MS. SCHALMAN-BERGEN: Right. And the plaintiff lost in that case, and we believe we should have won. We believe it was a substantial injustice to workers, the classification, but we lost. We can't bring in those cases and stand up for the rights of workers without the Court compensating us, and we appreciate that, Your Honor.

THE COURT: Well, the issue is not whether you're going to get compensated. In this case it's not whether or not you're going to get compensated at or toward the upper end of

the presumptive reasonable range for other kinds of cases.

You know, if you get 30 percent, you'll get, the three firms will get $61,000 less than they would get at 33 percent. And you are representing low-paid people, although maybe not as low paid in this case as in some other cases, but low-paid people, and it does advance an important public policy. But the fact they're low-paid people, if there's an unusual percentage going to the lawyers, you know, then those low-paid people are getting less money than they otherwise would get. And my role at this point is to be a fiduciary for the class because nobody is going to come in on the other side and argue --

MS. SCHALMAN-BERGEN: Absolutely, Your Honor. In this case particularly, as I'm local counsel, this is more of an academic discussion for me because my co-counsel will substantially benefit from this case. But just as a matter of practice, I do think it's an important public policy here, and we absolutely respect your role. It's an incredibly critical role, and we're mindful of that when we seek fees.

So I think here my co-counsel are seeking a third, which I think you pointed out is a median amount. Certainly there are cases where counsel seeks 40 percent, but we're not doing that here. But I'll be quiet because this is more an academic discussion for me than anything else.

THE COURT: Well, it's not, because you have an

institutional interest in this. Let me tell you, I have to do a lodestar check on the reasonableness of the request. And you gave me a multiplier, you gave me a lodestar figure that was about three times the amount requested. And frequently there's a multiplier, the amount requested is 1.8 above the correctly calculated lodestar. The lodestar, the Supreme Court tells us, *Blum v. Stetson,* is to be calculated based on reasonable rates times a reasonable number of hours. And I wrote about this extensively in *Arkansas Teacher*. Reasonable rates are reasonable rates in the community, so that would be here in Massachusetts. And evidence of what counsel charge is one indicia -- paying clients, what they charge paying clients is one indicia.

You made clear to me, as anybody should after *Arkansas Teacher*, that you don't have paying clients, but you say these are my firm's customary rates which have been accepted in other cases, but I don't know where the customary rates came from. Whether there's any effort to determine what lawyers, not in your firms, charge for comparable work in this community. Then I'm looking at the fee affidavits, and I see that there are -- well, let me ask you this. Were there any contract attorneys used by any of the firms in this case?

MR. EDELSTEIN: What do you mean by "contract firms"?

THE COURT: Here. Okay. SWCK has three staff attorneys listed. What's a staff attorney?

MR. EDELSTEIN: I believe the distinction is that they are not full-time associates, so they're paid on a different basis.

THE COURT: Are they full-time employees of the firm, or are they hired through agencies?

MR. EDELSTEIN: No. They are full-time employees of the firm.

THE COURT: Do they work full time for the firm?

MR. EDELSTEIN: That I don't know, Your Honor.

THE COURT: Well --

MR. EDELSTEIN: I can find that out. I'm not sure.

THE COURT: So wait a minute. Who is here from SWCK? I want to --

MR. EDELSTEIN: I am, Your Honor, Ori Edelstein.

THE COURT: That's what I thought. So these are three people who worked on the case, I'm told.

MR. EDELSTEIN: Correct, Your Honor.

THE COURT: But you don't know if they work full time for the firm?

MR. EDELSTEIN: I don't know their employment agreements with the firm itself, no, Your Honor.

THE COURT: Have you met them?

MR. EDELSTEIN: Not in person, Your Honor. They are in our Texas office.

THE COURT: And each of them has ascribed to her an

hourly rate of $680, and you gave me their backgrounds. They're relatively recent law school graduates from Texas. The highest Berger rate for a shareholder, which I assume means a partner, is $670, and the highest Lichten Liss-Riordan rate is $645. So why are your staff attorneys, relatively new attorneys who may not even work full time for your firm, worth $680 an hour here in Massachusetts?

MR. EDELSTEIN: Your Honor, their time is charged at the same rate as our associates at their level. I'm not sure that there's a distinction in their experience that would warrant charging less for their time.

THE COURT: Are you sure there isn't?

MR. EDELSTEIN: Am I sure there isn't?

THE COURT: You told me this is their customary rate, and it's not a rate that's charged to any client.

MR. EDELSTEIN: That's correct, Your Honor.

THE COURT: It's a rate that's used to give to judges like me to do a lodestar check. So what process is used to develop the customary rates in your firm?

MR. EDELSTEIN: Your Honor, we look at the rates in our market, and we set our rates accordingly. And then, as Your Honor noted, the only way we can actually get these, determine they're customary is then to have courts, at least courts here and courts throughout the country approve those rates. And some courts do find that they're high. But, you

know, in California, I think the courts that we're in, most of the time those courts, as we've indicated, have approved these rates.

THE COURT: You're in California? Are you in California?

MR. EDELSTEIN: Correct, Your Honor.

THE COURT: I'm in Massachusetts. Your case is in Massachusetts. And as I understand it, the rate is to be the Boston rate. It may be higher than California; it may not. But the lodestar check in this case, and I'm coming to think in every case, is meaningless. The Supreme Court thinks it's meaningful, and I used to think it's meaningful, and my colleagues have thought it's meaningful.

But I mean, there's only one case that was cited to me where a Massachusetts court accepted anybody's rates. I think it's the Smith case that the Lichten firm or somebody cited, you cited. It's not supposed to be -- and the idea that judges do this, I mean, how long does the usual hearing to approve a settlement, certify a class, approve a settlement and award attorneys' fees take?

MR. EDELSTEIN: It depends on the judge, Your Honor.

THE COURT: Well, yeah, from what to what?

MR. EDELSTEIN: Sometimes they can be very short when there's no objections and no requests for exclusions. Half an hour to several hours.

THE COURT: Did it occur to you that the judge might find it presumptuous that you gave a proposed order that filled in the blanks for how much attorneys' fees were being awarded? Do you know you did that?

MR. EDELSTEIN: I apologize if we did, Your Honor.

THE COURT: Do you know that you did?

MR. EDELSTEIN: I did look at the proposed order before we submitted it. I did not catch that, Your Honor, I apologize.

THE COURT: It makes it easy, just sign it.

MR. EDELSTEIN: No. We do appreciate the time and effort you take in pursuing the interest of the class on the issues, especially we recognize it's not a disputed issue. But again, we did spend significant time and effort and obtained a significant award for each of the 632 class and collective members, I think above and beyond what most other firms could have obtained in this type of case.

And while our rates that are used for the lodestar crosscheck may be higher than typical, I think we still have, as you noted, a third of our lodestar is represented by the fee request. It's not a positive multiplier. And even if our rates were significantly lower, I think we'd still be in a negative multiplier territory.

THE COURT: Well, that I think is your best -- that there's no multiplier. I don't know why a possibly part-time

staff attorney in Texas is worth more than a shareholder at Berger or the highest hourly rate, $644, a distinguished Massachusetts firm, certainly experienced Massachusetts firm, Lichten Liss-Riordan. It's just fiction.

MR. EDELSTEIN: And we understand that. And I mean, we don't -- as you noted, we don't charge clients, and we don't have any other basis other than what's been approved by other courts.

THE COURT: There are firms that do class action litigation that, you know, I'm told have an annual process where they review what the rates are that are charged in markets they work in. I don't know if -- did anybody ask Mr. Finberg what he charges? It probably would help you. You can say we should get paid what our adversaries get paid per hour. This is information you should be trying to develop. But in this case I find the lodestar check -- I can't do a lodestar check. You put that in as one of the findings, too.

All right. Would anybody else like to be heard on this?

All right. Well, I do admire your energetic -- your bringing your energy to these cases generally and your experience, but I'm awarding you 30 percent of the common fund, $555,000 plus the 41,000.

MR. EDELSTEIN: I believe it was 44,000.

THE COURT: $44,191.25. As I say, I'm sitting here

serving as a fiduciary for the class. As I understand it, that 30 percent was found to be the mean in that Eisenberg study in 2017, and the median is 33 percent, which means one half of the award or lower, which is some indication of reasonableness but not the most important.

I guess to me, having been immersed in these fee award matters for the last too many years, I do in this case, like in other cases, start with a presumption that 20 to 30 percent is reasonable and that I should start at 25 percent and go up or down. And I could go up to 33 percent if I was persuaded it was appropriate. But I don't find that anything higher than 30 percent is most appropriate in this case.

The size of the fund is $1,800,000 roughly, and there are more than 600 people benefitted. And a case like this exemplifies the reason to have class actions. The plaintiffs individually, not very many of them could or would pursue claims, and it wouldn't be cost efficient for an able, experienced lawyer to represent them one at a time, so they would have no recourse to the courts as a practical matter.

And the lawyers have brought skill and experience to the case. It's hard for me to determine whether they've been efficient. They say they eliminated hours for redundancy. I raised the question of the rates attributed to the staff attorneys. It just raises questions in my mind about how efficient anybody is being, how accurate anybody is being, how

thoughtful anybody is being. But this was complex litigation. It lasted several years. It was risky. Although experienced counsel choose their cases carefully, and in my experience, if a case survives a motion to dismiss or a motion to certify, plaintiff will almost always prevail. That's my personal experience. But it's in most cases when they're chosen carefully the class benefits and the lawyers benefit.

I know the awards in similar cases tend to be about 33 percent, but I don't know to what extent other judges apply the usual standards to FLSA cases. And with regard to public policy considerations, I think they've been expressed very well by counsel that the FLSA and the counterparts in the state reflect important public policies that low-paid workers who are unlikely to be able to fend for themselves and keep thelmselves from being underpaid particularly need class actions. But while you may be disappointed to get $61,000 less than you asked for, the message, since I gave you 30 percent, should be that I find that you did a good job and performed an important public service.

All right. So let's go to the service awards in this case. I do find it's appropriate to make service awards as is permissible and become far more common recently. The named plaintiffs, as I said earlier, didn't pick the lawyers and didn't supervise the litigation as would be expected if they were institutional clients in a securities case, but that's

partially because of the nature of the class. And I am struck by something that was argued in February that Mr. Fauntleroy said on page 70 of the transcript about the risks that the named plaintiffs took to come forward in this case.

Mr. Fauntleroy said that another potential employer -- Mr. Fauntleroy said on page 70 of the February 3, 2021 transcript, "The one issue I want to bring up as far as what you're talking about is that there's only three companies that do subcontract cable. And when I went over to the other company, they would ask me, like, different questions about J&L and how they paid their employees and about certain things. And they used to make jokes about how we can't hire anyone that worked at J&L because we may have a liability later on down the line, as far as if we don't pay you correctly, you may try to sue us."

So I believe that coming forward to be a named plaintiff in this could give somebody a reputation of being a troublemaker that could injure his ability to get another job, and that contributes to my conclusion that I should make service awards. I wonder if they should all get the same service award. They worked in the case for the same periods of time. You want $10,000 for each of them, but why is $10,000 the right amount, and why should they each get that amount --

MR. EDELSTEIN: Your Honor --

THE COURT: -- rather than something higher or lower?

MR. EDELSTEIN: -- $10,000 is similar, is an amount that's been approved by other courts for similar work on similar cases, and that's how we reached that number. It does reflect, as you noted, the potential injury to their name in pursuing additional work. It's easy enough to Google someone's name and see that they participated in a lawsuit over wages. I think we all hope that wouldn't impact a future employer's hiring decision, but it very well may. That's a risk they took again for the purpose of benefitting the class members, which they did an excellent job here. They all spent significant number of hours.

THE COURT: Well, 30 to 40.

MR. EDELSTEIN: Yes, 30 to 40 hours each. And while some joined later, they still underwent the same calls and investigation and participated in making sure that we had the right classes and the right claims and the right allegations in the amended complaint, all subject to discovery, and so they all played a similar role, although some of them, as you noted, for a bit longer than others, but ultimately the amount of time that each spent and the risks associated with it are all equivalent here.

Also all have signed and agreed to a general release of their claims so their release is broader than just the claims that were alleged in the complaint. They were releasing all potential claims that they could bring against J&L.

THE COURT: For example, what?

MR. EDELSTEIN: I mean, any type of other discrimination. Anything except workers' comp has been released. I would also note that all four of them were at the preliminary hearing. All four of the plaintiffs are here today. They've all played the same role in pushing this case forward on behalf of the class and collective, and that's why we feel they should all be compensated the same.

THE COURT: Okay. I mean, the advent of service awards, which in my experience is relatively recently, creates some tension because in approving the settlement, I'd say well -- you know, I look to see if the named plaintiffs are treated better than the other class members. And they're not in terms of your allocation plan, but they knew you were going to ask for service awards. They didn't know what amount.

The fact that $10,000 is customarily given in other cases is saying other judges customarily find your staff attorneys have a reasonable rate of $680 an hour, more than the partners in Massachusetts. That doesn't carry much weight. But I think I'll say as fiduciary -- and I have thought about reducing or not awarding them all the same. But having just saved the class $661,000 for attorneys' fees, I feel more comfortable awarding each of the four named plaintiffs, Mr. McKee, Mr. Fauntleroy, Mr. Jean-Pierre, Mr. Metelus a $10,000 service award.

All right. I think the last question, and I asked you this last time, is whether Greater Boston Legal Services is a suitable cy pres recipient if there's $50,000 or less leftover after the distribution. And you've provided me detail this time that it is an organization that not only does good work for low-income people but does wage and hour work. Is that right?

MR. EDELSTEIN: Correct, Your Honor.

THE COURT: All right. I'm satisfied they're a suitable cy pres recipient under the applicable standards.

Are there any other matters for today before I amend your proposed order with regard to attorneys' fees? And I believe I'll enter it otherwise.

MR. EDELSTEIN: Not from plaintiffs, Your Honor. Thank you.

MR. FINBERG: Not for defendant, Your Honor.

THE COURT: All right. Court will be in recess. I'll see my staff in the breakout room and the court reporter, please.

MS. SCHALMAN-BERGEN: Your Honor, thank you so much for your time and attention to this matter. And thank you to Mr. Bennett for working with us. It's been a pleasure to work with you adversarially but also to work to get this done. We really appreciate it.

THE COURT: Okay. Thank you very much. (Adjourned.)

CERTIFICATE OF OFFICIAL REPORTER

I, Kelly Mortellite, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing transcript is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter to the best of my skill and ability.

Dated this 16th day of December, 2021.

/s/ Kelly Mortellite

_____

Kelly Mortellite, RMR, CRR

Official Court Reporter